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The Problem of Recognition of Human Rights: Does Explicative-Existential Justification Really Work?²

1. Introduction

Since human rights became one of the central topics of the philosophy of law, the question of their justification has been addressed. It is repeatedly concluded in various ways that there is not, and perhaps there cannot be, a satisfactory solution.³ Although these rights are successful in practice, strong intellectual skepticism persists against them.⁴ One of the authors who refused to accept it and offered his answer to the question of their justification is Robert Alexy.⁵ Adopting the discursive theory as his starting point, Alexy named his justification explicative-existential. The aim of this article is to analyse it more thoroughly and point out its limitations. In the first part, this justification will be briefly introduced and compared with a similar approach by Rainer Forst. In the second, it will be confronted with three different scenarios, which point to the problematic nature of its explicative component. The aim of these confrontations will be to prove that Alexy's approach cannot successfully deal with the problem of the transition from facts to norms, or rather that this approach requires two assumptions to be accepted. The first is to give absolute value to all, even potential, people. Such an assumption is purely normative and its closer analysis will be given attention in the third part of the article. The second assumption is the identification of human beings with persons, which will be analysed in the last part of the article. While the first of these assumptions is more widely accepted, the second must be rejected as indefensible. This article will therefore try to prove that explicative-existential justification can be considered a credible

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³ A. Macintyre, *After Virtue*, Notre Dame 2007, p. 69; M. Freeman, *The Philosophical Foundations of Human Rights*, "Human Rights Quarterly" 1994/3, p. 500; V. Bufacchi, *Theoretical Foundations for Human Rights*, "Political Studies" 2007/3, p. 601.

⁴ Cf. C.R. Beitz, *The Idea of Human Rights*, Oxford 2009, p. xi; A. Sen, *Elements of a Theory of Human Rights*, "Philosophy & Public Affairs" 2004/4, p. 316.

⁵ R. Alexy, *Menschenrechte ohne Metaphysik?* [Eng. *Human Rights without Metaphysics?*], "Deutsche Zeitschrift für Philosophie" 2004/1, pp. 19–21; R. Alexy, *Law, Morality, and the Existence of Human Rights*, "Ratio Juris" 2012/1, p. 11.

defence of the rights of persons, but not of human beings, which, after all, corresponds to its roots in Immanuel Kant's ethics of rational beings.

2. Explicative and existential aspect of Alexy's justification

While contemplating the justification for human rights, Alexy states that he defends their Kantian position, which he describes as liberal. According to this position, the function of human rights is to protect private and public autonomy.⁶ The starting point for Alexy's justification of these rights is the discursive theory, while the justification itself consists of two components – explicative and existential – which must be connected if it is to be successful.⁷

The explicative argument is closely related to the discursive theory. Its very designation refers to the fact that it is supposed to make explicit something that is implicitly but necessarily contained in human practice.⁸ By arguing and asking questions, we participate in the discourse. Discursive practice presupposes discursive rules that express the ideas of equality and freedom. These ideas then form the basis of human rights.⁹ Alexy specifically states:

To recognize another individual as free and equal is to recognize him as autonomous. To recognize him as autonomous is to recognize him as a person. To recognize him as a person is to attribute dignity to him. Attributing dignity to someone is, however, to recognize his human rights.¹⁰

However, the explanatory argument alone is not enough. Alexy himself points out some of the problems that are associated with it.¹¹ The first problem with this argument is that one can participate in the discourse only partially, e.g. within a certain community and not outside of it.¹² There may even be people (e.g. the mentally disabled) who cannot participate in the discourse at all. So, do they have any human rights? The second problem, according to Alexy, is that having the interest to participate in the discourse does not imply that one is also interested in its application, especially in the realm of action.¹³ A question arises as to whether we want to see ourselves as discursive and reasonable creatures; whether we choose to be such creatures.¹⁴ This decision has an existential character¹⁵ and forms the core of his existential argument. According to Alexy, it is intrinsically connected to the explicative argument in such a way that it has the character of endorsement of something which has been demonstrated by explication that the ability to participate in discourse is necessarily connected with human beings.¹⁶

Alexy's described theory is in some respects very reminiscent of the approach of the German philosopher Rainer Forst, who regards the moral right to justification to

⁶ R. Alexy, *Discourse Theory and Human Rights*, "Ratio Juris" 1996/3, pp. 209–210.

⁷ R. Alexy, *Menschenrechte...*, p. 21.

⁸ R. Alexy, *Menschenrechte...*, p. 19.

⁹ R. Alexy, *Law...*, p. 11.

¹⁰ R. Alexy, *Law...*, p. 11.

¹¹ Cf. R. Alexy, *Law...*, p. 11.

¹² R. Alexy, *Law...*, p. 11. Also cf. R. Alexy, *Discourse...*, p. 217.

¹³ R. Alexy, *Menschenrechte...*, p. 20.

¹⁴ R. Alexy, *Law...*, p. 12.

¹⁵ Cf. R. Alexy, *Discourse Theory and Fundamental Rights*, in: A.J. Menéndez, E.O. Eriksen (eds.), *Arguing Fundamental Rights*, Dordrecht 2006, p. 22.

¹⁶ R. Alexy, *Law...*, p. 12.

be the basis of human rights.¹⁷ Therefore, it is good to highlight, at least very briefly, their common features and differences. Forst considers that human beings are justificatory beings.¹⁸ Human beings state the reasons for their actions, and in some contexts consider it to be their duty. At the same time, they believe that this duty also applies to others. All norms should therefore be justified by giving reasons of a general and reciprocal nature. According to Forst, the notion of normative agency is at the heart of human rights discourse.¹⁹ However, human rights are not instruments for the protection of this agency, but its expressions.²⁰ They are not derived from any conception of good, but they are the result of an intersubjective discursive process that cannot be reciprocally and generally denied by persons who respect the right of others to justification.²¹ Their normative basis is the right of every moral person to be respected as a holder of the right to justification.²² Based on this, the idea of human rights can be constructed.²³ Forst further states that “the legal and political function of human rights is to make [the right of justification] socially effective, both substantively and procedurally”.²⁴

Obviously, there are many similarities between Alexy’s and Forst’s approaches. Both are significantly influenced by the discursive theory, and both accept the assumption that humans are discursive beings.²⁵ However, Forst’s justification of human rights is not formulated as openly and clearly as Alexy’s. His primary goal is not to defend human rights, but to understand the concepts of political and social justice,²⁶ a part of which we can also consider these rights.²⁷ According to him, human rights are, after all, an essential part of this justice, which, however, exceeds them in many respects.²⁸

3. Identification of assumptions of explicative-existential justification: is-ought problem in Alexy’s theory

3.1. General remarks

Alexy claims that his justification to some extent solves the problem of transition from facts to norms. It only describes norms that are already put to practice in some way, without setting them from some external position.²⁹ However, I believe that this statement can be very misleading, because even his approach, in order to be truly functional, requires accepting some normative assumptions that are not entirely self-evident.

The is-ought problem can be considered one of the great challenges to human rights theories. Some approaches remain blind to this and do not solve it. This is the case with

¹⁷ R. Forst, *The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach*, “Ethics” 2010/4, p. 712.

¹⁸ R. Forst, *The Right to Justification*, New York 2007, p. 1.

¹⁹ R. Forst, *The Justification...*, p. 722.

²⁰ Cf. R. Forst, *The Justification...*, p. 724.

²¹ R. Forst, *The Justification...*, p. 722.

²² R. Forst, *The Justification...*, p. 734.

²³ Cf. R. Forst, *The Right...*, p. 5.

²⁴ R. Forst, *The Justification...*, p. 712.

²⁵ Matthias Klatt, for example, accepts the same assumption. See: M. Klatt, *Proportionality and Justification*, in: E. Herlin-Karnell, M. Klatt (eds.), *Constitutionalism Justified. Rainer Forst in Discourse*, New York 2020, p. 165.

²⁶ R. Forst, *The Right...*, p. 2.

²⁷ Some other differences between Alexy’s and Forst’s theories are nicely captured by Klatt. Cf. M. Klatt, *Proportionality...*, pp. 168–169.

²⁸ R. Forst, *The Justification...*, p. 736.

²⁹ R. Alexy, *Law...*, p. 13.

basic needs theory.³⁰ Its supporters, such as David Miller, assert that basic needs are capable of generating obligations. However, this thesis is based on his intuition only and Miller himself admits he is unable to justify it.³¹ The capabilities approach suffers from a similar problem. The fact that we state that someone has a certain capability does not in any way preclude us from denying them the right to any related specific treatment.³² Both of these approaches have as their base the facticity with which they associate certain normative requirements without further clarification.

In addition to these approaches, however, there are theories that openly declare ambitions to solve the is-ought problem. Probably the most sophisticated of them is the ethical rationalism of Alan Gewirth,³³ which is still the subject of lively discussion today.³⁴ This author offered a complex but well-arranged argument about fifteen steps, centred on the concept of normative agency. To put it very simply – according to him, every agent must accept their freedom and well-being as the necessary conditions for their actions and everyone who is also an agent must be granted the same rights as herself or himself.³⁵ However, even this theory is criticized by some authors for making a naturalistic fallacy. For example, Paul Allen points out that in some steps of his argument, Gewirth confuses the description of the prescription with the prescription itself.³⁶ Similarly critical is William Donald Hudson, according to whom an agent can evaluate their own evaluation.³⁷ The question of what is correct, in this case, is open.

The difficulties of human rights theories in dealing with the is-ought problem may not seem so surprising, because we encounter them in many other cases.³⁸ We could blame not only these theories, but also the possible alternatives to them. Many authors believe the gap between *is* and *ought* cannot be bridged.³⁹ Various reasons for this conclusion are presented, some of which point out the different functions of both the spheres.⁴⁰ Other authors seek support in logic and highlight that a conclusion of an argument cannot contain an element that would no longer be present in its premises.⁴¹ Nevertheless, even in the current literature, approaches are still emerging that consider bridging the aforementioned gap. One of them is, in the context of human rights, Alexy's approach, which was presented above. We will, therefore, focus on its closer analysis.

As a starting point for its criticism, we will use a variant of the well-known dilemma of the ticking bomb: the police detained a terrorist who hid a bomb in the city. If the

³⁰ For this reason, some earlier versions of these theories are criticized by Alan Gewirth. See: A. Gewirth, *The Epistemology of Human Rights*, "Social Philosophy & Policy" 1984/2, pp. 7–8.

³¹ Cf. D. Miller, *Grounding Human Rights*, "Critical Review of International Social and Political Philosophy" 2012/4, p. 422.

³² M.C. Nussbaum, *Capabilities and Human Rights*, "Fordham Law Review" 1997/2, pp. 295–296.

³³ Gewirth first introduced his solution to the is-ought problem in an article A. Gewirth, *The "Is-Ought" Problem Resolved*, "Proceedings and Addresses of the American Philosophical Association" 1974/47, pp. 34–61. He then developed this solution more thoroughly and linked it to the concept of human rights in his book A. Gewirth, *Reason and Morality*, Chicago–London 1978.

³⁴ See e.g.: A. Kohen, *In Defense of Human Rights: a Non-religious Grounding in a Pluralistic World*, London 2007, p. 38ff; M. Boylan, *Natural Human Rights: a Theory*, Cambridge 2014, p. 157ff.

³⁵ For a detailed description of Gewirth's argument, see the monograph A. Gewirth, *Reason...*, p. 48ff. See his article for a more brief description, A. Gewirth, *The Epistemology...*, pp. 14–18.

³⁶ P. Allen III, *A Critique of Gewirth's "Is-Ought" Derivation*, "Ethics" 1982/2, p. 218.

³⁷ W.D. Hudson, *The "Is-Ought" Problem Resolved?*, in: E. Regis Jr. (ed.), *Gewirth's Ethical Rationalism*, Chicago–London 1984, p. 124.

³⁸ For more detailed characteristics of various theories seeking to is-ought problem, see: W.D. Hudson (ed.), *The Is-Ought Question. A Collection of Papers on the Central Problem in Moral Philosophy*, London 1969, p. 99ff.

³⁹ Cf. K. Witkowski, *The "Is-Ought" Gap: Deduction or Justification?*, "Philosophy and Phenomenological Research" 1975/2, p. 235.

⁴⁰ Cf. J.R. Searle, *How to Derive "Ought" From "Is"*, "The Philosophical Review" 1964/1, p. 53.

⁴¹ In addition, Gewirth gives few other reasons. A. Gewirth, *The "Is-Ought"...*, pp. 38–40.

bomb explodes, it will kill a lot of people. Police first tried to persuade the terrorist to tell them where he had hidden the bomb. The police were having a thorough debate with him, from which it clearly emerged that the terrorist understood the arguments of the police officers and himself stated the arguments against them. Undoubtedly, he participated in the discourse. However, he refused to reveal where he hid the bomb, so eventually the police began torturing him.

This scenario can be further developed in three different ways: 1) police officers refused to recognize that a terrorist is a holder of human rights; 2) police officers recognized that the terrorist is a bearer of human rights, but did not respect those rights because they were overruled by a stronger moral requirement; 3) police officers recognized that the terrorist is a bearer of human rights, but they violated these rights. In the following lines, we will examine the problems associated with the application of Alexy's justification in all these contexts, respectively, the issue of conditions under which it is possible or impossible to defend these positions, and whether in these contexts the weaknesses of Alexy's solution of the transition from facts to norms are not revealed.

3.2. Refusal to recognize human rights

Is it possible to argue with someone first and then refuse to recognize their human rights? Alexy assumes that in such a case we are in a performative contradiction. The attitudes we express are at odds with what we do. That is why the procedure of police officers who first lead a discourse with a terrorist and then proceed to torture him is problematic. If police officers take this course of action and at the same time intend to avoid performative contradiction, they could try to defend their actions in at least one of the two following ways.

First, police officers could refuse to fix their once-acknowledged recognition over time. Thus, they would recognize the human rights of terrorists, but only for the duration of their discourse with them. In other words, as soon as the police ended the argument game, their recognition would disappear along with it. They could talk to a terrorist; they could even torture them. The only limit would be that they should not do both at the same time.

We could challenge this counter-argument by pointing out that recognition is not just a matter of our will. If we participate in discourse with someone, we can do so only because they have such a capability. It remains with them, even if they are not currently using it. Should we treat a person with this capability as if they have it now and again and, at times, as if they do not have it, we would be lacking consistency. It would be similar, after all, if we had two people with this capability, and we would treat one of them as having it and the other as not having it. The relevance of this answer lies in the acceptance of two assumptions. The first is that we should be consistent. I am convinced that the meaningfulness of inconsistency as such is difficult to defend. However, in connection with it, I could ask myself whether we cannot be consistent with a number of different stances that can compete with each other. Then we would have to be able to justify why we should be consistent in this particular way and not in another. We would have to be able to justify why we prefer one consistency variant over the other variants. The second assumption is that we want to participate in the argument game, so we do not reject the game itself. If we consider this assumption in isolation, we seem to have to agree with Alexy that a consistent rejection of argumentation would have fatal

consequences for us.⁴² In short, one cannot live without argument, just as one cannot live without air.

The second way in which police officers can defend their conduct is more sophisticated: if I recognize a terrorist as equal and free, this recognition applies only to his participation in the discourse. In other words, I recognize him only for the argument game, and this recognition ends where the game ends. I no longer recognize him as equal and free in other contexts.

Alexy anticipates this problem and envisages its solution (as well as the solution of the objections described in the previous first point) in the addition of the existential argument.⁴³ It also includes our decision to recognize human beings as discursive beings.⁴⁴ The argument against this could be the question of why we should have a strong interest in recognizing other people as equal and free in all situations. We will address this issue in the next part of the paper. However, one can upfront agree with Tomáš Sobek's conclusion that the functionality of Alexy's approach requires the adoption of certain second-order attitudes.⁴⁵ So we cannot say that we are building purely on the fact of recognition. There must already be certain normative elements to it.

3.3. Overruling human rights by a stronger moral requirement

The second scenario forces us to ask the question whether the moral requirements derived from Alexy's approach overrule all else. Police officers can agree to recognize a terrorist as equal and free not only for the purposes of the argument game, but also universally. But why should the requirements derived from it overrule all other moral considerations? Why, for example, should they not give in to requirements derived from the principle of utility?

We do not necessarily have to think of recognition as being a binary category (i.e. I recognize/I do not recognize), but we can also take it to be a gradual category (i.e. I recognize something more, something less). Alternatively, some intensity can be attributed to recognition and this intensity can vary.⁴⁶ If the police finally decide to torture a terrorist, it does not necessarily mean that they do not recognize their human rights. On the contrary, it can only signify that the police recognize other requirements with a greater intensity. The various actions of police officers, which may seem as examples of contradictions at first sight, may in fact be a good indication of their moral priorities. Still, police officers can be consistent, only from a different point of view (for example, from the already mentioned perspective of applying the principle of utility, etc.). So, the question arises, why should one moral aspect be preferred over another? Why should one form of consistency be preferred over another? This is again a normative question that can hardly be solved by reference to some factuality. Here again, we do not find the answer to it in the explicative argument itself, but we must try to find it in the existential argument.

⁴² R. Alexy, *Discourse Theory*..., p. 217.

⁴³ R. Alexy, *Law*..., p. 11–12.

⁴⁴ R. Alexy, *Law*..., p. 12.

⁴⁵ Cf. T. Sobek, *Metaethics of Human Rights: An Expressivist Approach*, "Rechtstheorie" 2019/4, pp. 3, 22–26.

⁴⁶ An interesting question is how we should understand the concept of recognition. Is it just a cognitive state? I am inclined to share the view that in the context of Alexy's consideration it makes good sense to understand it in a way that shows similarities with acceptance.

3.4. Recognition of human rights and their violation

The third scenario can be illustrated by the following example. One person (let us call him Marquis de Sade, for example) invites another person (let us call him Mr. Dignified) to his home and begins to discuss an important philosophical topic. During the debate, Marquis de Sade convinces Mr. Dignified to agree with his conclusions but, as their debate progresses, he begins to torture him. At first, Mr. Dignified thinks that this torture should induce him to agree with de Sade's conclusions. Very soon, however, it turns out there is no connection between whether Mr. Dignified agrees or disagrees with those conclusions and whether or not he is tortured. On the contrary, the connection is that de Sade needs to recognize the equality and freedom of the other person, because otherwise he could not even torture him. Without the recognition of equality and freedom, it would not be torture, but abuse. When someone hurts an animal we say they are abusing it, not torturing it. It is the recognition of someone else, equal and free, that is the defining feature of torture. In other words, de Sade attributes human rights to Mr. Dignified and at the same time violates them. Likewise, we can assume that police officers recognize the human rights of terrorists, but still violate them.

It is true that we need norms precisely to provide us with clues as to what behaviour we should avoid and point in the right direction. It is unrealistic to expect no one will violate the norms. Norms assume that at least some people tend not to comply with them, and that such non-compliance in practice necessarily occurs at least sometimes. Of course, from a practical point of view, it is necessary to address how often this happens; in practice, it certainly does not make much sense to talk about the existence of a norm that no one follows.⁴⁷

Interesting questions also arise given the perspective outlined in subsection 3.3. Can we say that even Marquis de Sade recognizes human rights in our scenario, but overcomes them with some stronger requirement? Such as, for example, the requirement to maximize one's own pleasure? Such reasoning also makes sense, although from most perspectives it would hardly be possible to attribute a moral character to such conduct. However, if we do not interpret this scenario this way, but stick to its original interpretation, then I do not consider it to be a fundamental objection to Alexy's justification.

3.5. Partial summary

In the case of an explicative argument, the word "recognize" must be understood correctly. Explicative argument is not a justification. It only informs us about what we do, what we recognize, but does not give us reasons why our practice is good. In addition, we may ask ourselves how wide this recognition is. In any case, whatever we do, we can always meaningfully ask if it is right, if we really should do so. The word "recognize" is thus of limited informative value in its context. For the explicative argument to work, it must necessarily be supplemented by an existential argument. In the case of existential argument, we need to get an answer to the question of why we should take the requirement of universal respect for the person and its extraordinary position over all other moral requirements seriously.

⁴⁷ The importance of social effectiveness in defining the law is a much more complex issue that deserves a more in-depth analysis. In this regard, reference can be made at least to a brief summary of some of Alexy's interesting considerations. See: R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism*, Oxford 2002, pp. 128–129.

4. Analysis of the existential argument

I see the main problem of the existential argument to lie in the question why should we make a given existential decision rather than some other one? Is it related to the fact that it is not possible to live humanly without argumentation, as Alexy himself claims?⁴⁸ It is misleading to say that such a decision is the only consistent one. When I say that I get into a performative contradiction when I have a discourse with someone and then deny their human rights, nothing in itself forces me to interpret my recognition of another person so broadly. Nothing forces me not to take into account the competitive moral requirement, which is derived, for example, from the principle of utility. It is from its perspective that my attitudes and actions can be consistent. So why not prefer this way of consistency, but rather the one that Alexy strives for? If he says that this is a matter of agreeing to something that has been proved by the explication,⁴⁹ then I think the previous lines have clearly shown that explication alone proves little.

By denying human rights, can I eliminate the possibility of argumentation, without which it is not possible to live? If I argue, equality and freedom of my partner are its constitutive elements. If they were not present here, it would not be an argument. When I argue with someone, it is impossible to not recognize them because in that case I would not argue with them anymore. However, by not being consistent in the way Alexy imagined, I will not cancel the possibility of argumentation. When I make people slaves, I will not deprive them of the potential to argue in the future. I can have a debate with a slave while ignoring his rights related to many other areas of human activity. So, it does not force me into Alexy's preferred decision that this is the only one possible.⁵⁰

I think the functionality of Alexy's justification requires accepting the assumption that a person has extraordinary value. Such an assumption in connection with human rights is certainly not surprising. Tom Campbell says that the attractiveness of rights lies in that "they express the great moral significance of every individual human being".⁵¹ This is even more true of the concept of human rights.⁵² Many people undoubtedly accept this as self-evident. However, doubts may also arise in connection with it. For example, in the field of normative ethics, such attitudes have traditionally been opposed to hedonist-oriented approaches that emphasize not the value of persons, but pleasure. This is one of the reasons why it would seem more appropriate to supplement the existential argument itself with other elements, such as maximizing the utility that Alexy has worked with before.⁵³ The foundation on which his explicit-existential justification is based seems to me to be very relevant, but still debatable, and above all not the only

⁴⁸ Cf. R. Alexy, *Discourse Theory*..., p. 217.

⁴⁹ R. Alexy, *Law*..., p. 12.

⁵⁰ I think it is possible to respond likewise to the consideration that Klatt tries to deal with the is-ought problem in the context of Forst's approach. Klatt points out that it is misleading to try to justify the right to justification externally, that is, from some position outside our moral practice. On the contrary, we must perceive this effort as internal, because we construct the normative moral world only intersubjectively in our practice. However, even if the right to justification, or Alexy's similar starting points, are necessary preconditions for us to think about morality, this necessity does not, in my view, explain why the very criteria of what is and is not right should be derived from them. I also suggest this in my paper. For Klatt's idea, see: M. Klatt, *Proportionality*..., p. 165.

⁵¹ T. Campbell, *Rights. A Critical Introduction*, London–New York 2006, p. 3.

⁵² For example, M.J. Perry says that any credible recognition of human rights requires acceptance of the idea that the human being is sacred. This idea consists precisely in attributing the extraordinary value to this being and with the opinion derived from it that some choices are to be made and some to be rejected. M.J. Perry, *The Idea of Human Rights. Four Inquiries*, New York–Oxford 1998, pp. 4, 5, 11.

⁵³ Cf. R. Alexy, *Discourse Theory*..., p. 213.

one possible. Of course, we can agree on human rights for various reasons.⁵⁴ And Alexy's approach seems to me in a much better light if we see it as one of several pillars that support the massive construction of human rights.⁵⁵ Not only as a single pillar.⁵⁶

5. The rights of persons or the rights of human beings?

By definition, we usually understand human rights as the rights of all human beings.⁵⁷ Therefore, any theory that fails to defend why these rights should belong to this broad group seems unreliable.⁵⁸ Even if we accept that Alexy's justification justifies some rights, are they really the rights of all human beings, or just persons?⁵⁹ Undoubtedly, it is only persons who can participate in the discourse. This problem requires deeper reflection, to which this part of the paper will be devoted.

First, imagine Winston having a debate with a parrot. He presents arguments and the parrot responds with learned sentences that, however, give Winston the impression of meaningful reactions to the arguments he has presented to the parrot. In this case, can we consider it participation in the discourse and, according to the logic of Alexy's argument, should we admit that Winston recognizes the parrot as equal and free? Thus, should he also accord human rights to it? I believe that such conclusion must be rejected. Although it may seem so to Winston, this is not real exchange of arguments. In fact, the parrot does not have the capacity to participate in a discourse. If Winston thinks so, he is wrong, and even his attribution of human rights to the parrot is wrong. So, it seems that if we are to give someone any rights based on an explicative argument, they must really have the capability to participate in the discourse. It is not enough that we just think someone is arguing – they really have to argue. The supposed participation in the discourse cannot produce true recognition.

Why should the explicative-existential justification justify the rights of all human beings, including those who are not persons? For example, a child born with anencephaly is undoubtedly not a person and never will be. Not only do they not currently have the capability to participate in discourse, but they do not have it potentially – they will never ask anyone a question, they will never argue, and they will never understand any arguments. Nevertheless, we will without hesitation call such a child a human being. Thus, something other than this type of capability necessarily connects them with other human beings. Although it is suggested that such a link is a shared genetic information, such a consideration can be greatly simplified. In previous centuries, we defined the human being in different ways, which today seem to us erroneous or inaccurate. It is possible that in the future we will think the same about the various definitions that are currently on offer, including the

⁵⁴ Cf. John Rawls' idea of overlapping consensus. J. Rawls, *Political Liberalism*, New York 2005, p. 133ff.

⁵⁵ The fact that the relevance of Alexy's approach derives precisely from our existential decision to understand others as discursive beings is, in my view, finally admitted by Klatt. This sets certain limits to Alexy's human rights justification. Cf. M. Klatt, *The Proportionality...*, p. 168.

⁵⁶ Another skeptical question that arises in connection with Alexy's justification is whether it was not possible to construct a simpler theory with its assumptions than his own. However, just trying to outline such a theory would go far beyond the scope of this paper.

⁵⁷ J. Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca-London 2013, p. 10; J. Feinberg, *In Defence of Moral Rights*, "Oxford Journal of Legal Studies" 1992/2, p. 154; M. Freeman, *Human Rights. An Interdisciplinary Approach*, Cambridge 2011, pp. 66–67; A. Gewirth, *The Epistemology...*, p. 1; D.N. Husak, *Why There Are No Human Rights*, "Social Theory and Practice" 1984/2, p. 125; A. Kohen, *In Defense of Human Rights: a Non-religious Grounding in a Pluralistic World*, London 2007, p. 6.

⁵⁸ A. Etinson (ed.), *Human Rights: Moral or Political?*, Oxford 2018, p. 9.

⁵⁹ To distinguish between human beings and persons, compare D.N. Husak, *Why There...*, p. 127.

definition of genetic information just mentioned. Perhaps we can even consider the human being as an essentially contested concept. Even if we accept that the question of what this kind of being is does not have a clear answer, we can say with certainty what this being is not. A human being is not the same as a person. So why should we attribute human rights to every human being when they are tied to characteristics that not everyone has?

From an empirical point of view, not all people are persons. Nonetheless, can the claim that a typical human being is a person help us in our thinking? If it means that most human beings are persons for most of their lives, it is empirically true. However, this does not in any way justify why we should treat all human beings as persons. Therefore, if we argue that we should also grant humans who are not persons the same rights as persons, because the typical human being is a person, it is already a normative requirement that must be justified by something. It certainly cannot be considered self-evident. No empirical characteristic that unites all human beings into one species is in itself a sufficient reason to be included in one common category with persons, if it were our parrot from the previous example, or all species of animals, including the most intelligent ones, should be discarded from it. Is not the decision to attribute human rights alongside persons only to human beings who are not persons completely arbitrary? Are we not acting irrationally and inconsistently in such a case? Why does the fact that an animal species has a certain predominant feature give special status to those of its members who do not have it, while not to members of other species? Why should belonging to such a species determine the granting of such status, and not belonging to some other, more broadly or more narrowly conceived group?

In order to make sense of the attribution of rights to all human beings, we would have to assume that a certain species has a special status based on the ability of a high segment of its members, which is then transferred to all its members without distinction. Such an assumption does not follow in any way from the framework of the explicative-existential justification. There is no justification for equating human beings with persons. Such a thesis is added to it as one of their starting points. But what could be its justification? Is it not either consequentialist or mystical?

Alexy's theory thus suffers from the problem that it cannot justify why we should attribute human rights to all human beings, and not just persons. Of course, it is not the only one in this respect as Gewirth's approach faces the same difficulties.⁶⁰ We must either extend the group of human rights holders to at least some animals, or limit it to persons only. Is this necessarily such a major problem? Of course, just refusing to give human rights to patients in a permanent and irreversible vegetative state does not mean that we cannot take them seriously for some other moral reason.⁶¹ Likewise, the concept of legal rights may not accurately reflect the concept of moral rights, and we can certainly find other reasons for those who do not have moral rights to have legal rights.

6. Conclusion

In this paper, we have gradually come to the conclusion that Alexy's explicative-existential justification suffers from several problems. It cannot adequately deal with

⁶⁰ M. Renzo, *Human Needs, Human Rights*, in: R. Cruft, S.M. Liao, M. Renzo (eds.), *Philosophical Foundations of Human Rights*, Oxford 2015, p. 574; A. Kohen, *The Possibility of Secular Human Rights: Alan Gewirth and the Principle of Generic Consistency*, "Human Rights Review" 2005/1, p. 64.

⁶¹ Cf. M. Renzo, *Human...*, p. 574.

the transition from facts to norms. It is therefore based on several normative premises, the acceptance of which is certainly not self-evident. It further identifies human beings with persons and fails to sufficiently substantiate why we should attribute human rights to those human beings who are not persons.⁶² Are these reasons sufficient to reject this justification as problematic?

There is no justification in a vacuum and everyone has to start somewhere. In this sense, it is necessary to reflect how other justification theories of human rights stand in the light of similar counter-arguments.⁶³ At least the suggested excursion on theories of basic needs and capabilities, as well as on Gewirth's ethical rationalism, suggests that these theories fail to do much better. Some counter-arguments may apply in general and be equally fatal for different competing approaches. In this light, it makes good sense not to ask whether Alexy's theory is able to meet certain absolute requirements, but how successful it is compared to other justifications offered, and whether it has a group of its proponents with regard to its normative assumptions.

If we limit the framework in which Alexy's justification is to operate, then we can agree that it can be a relatively functional defence of human rights. The assumption that a certain extraordinary value is associated with a person is relatively plausible and widely, though not absolutely, acceptable. For those who accept such an assumption, it can play the role of a convincing theory and strengthen their positive attitude toward human rights.

The Problem of Recognition of Human Rights: Does Explicative-Existential Justification Really Work?

Abstract: This paper analyses Robert Alexy's explicative-existential justification of human rights. The author identifies several problems that are associated with it. An analysis of Alexy's explicative argument suggests that it cannot cope with the transition from facts to norms. Notably, this argument does not explain why its requirements cannot be overruled by some other moral reason (for example, the utility principle). The answer that Alexy offers in his existential argument is not considered sufficient by the author of this paper. Although this argument complements the necessary normative premises, the existential decision preferred by Alexy is not the only one necessary. It can be admitted that for many people such a decision is attractive. However, even if we accept that explicative-existential justification is credible in some context, it is correct to apply it only to the rights of persons and not to the rights of human beings. In the final part, the author shows that the claim that this theory can justify even the rights of human beings who are not persons is indefensible.

Keywords: human rights, justification, explicative-existential justification, is-ought problem, universality of human rights

⁶² Already Douglas N. Husak noticed in the 1980s that due to the development of medicine, the group of human beings, which are not persons, is expanding. I believe this trend has continued since then, making the related issue discussed in my paper increasingly acute. For Husak's original consideration, see: D.N. Husak, *Why There...*, p. 130.

⁶³ For the fact that many justification theories of human rights justify the rights of persons rather than the rights of human beings, see: D.N. Husak, *Why There...*, p. 139.

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